Supreme Court, U.S.
FILED
No. 93 1454 MAR 15 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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March 15, 1994

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC 30 1993

KENNETH CLAIR,	
Petitioner-Appellee,	Nos. 93-99004 & 93-99010
vs.	D.C. No. 93-1133-GLT
DANIEL B. VASQUEZ,, as Warden of San Quentin State Prison	ORDER
Respondent-Appellant)	

Before: D.W. NELSON, NOONAN and LEAVY, Circuit Judges

The order, filed on December 2, 1993, is withdrawn.
These appeals are hereby dismissed as moot.
The motion for costs and attorney's fees is denied.
IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
NOV 12 1993
ENTERED
NOV 16 1993

KENNETH CLAIR,	)	DEATH PENALTY
	)	
Petitioner,	)	Case No. CV 93-1133-GLT
	)	
v.	)	ORDER SETTING THE FILING DATE DATE FOR THE PETITION AND STAYING THE SETTING OF AN EXECUTION DATE
	)	
DANIEL VASQUEZ, Warden of California State Prison at San Quentin,	)	
	)	
Respondent.	)	

The Court discussed the filing date for the petition for writ of habeas corpus at the status conference held on November 5, 1993. Having considered the position of both parties, the Court orders petitioner to file his petition for writ of habeas corpus no later than September 15, 1994.

The Court further orders that the execution of the sentence of death imposed upon Kenneth Clair, and any proceedings related to the setting of an execution date, be

stayed until September 19, 1994 to allow petitioner to file his petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: November 12, 1993

/s/G.L. Taylor

Gary L. Taylor
United States District Judge

Henry H. Rossbacher, Esq. (SB #060260)
Linda L. Griffis, Esq. (SB #100827)
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Attorneys for Petitioner
KENNETH CLAIR

FILED
OCT 7 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, vs. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133-GLT DEATH PENALTY ORDER STAYING EXECUTION

Upon application of Henry H. Rossbacher, appointed counsel for petitioner Kenneth Clair, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

The execution of the sentence of death imposed upon Kenneth Clair is hereby stayed for an additional one hundred and twenty (120) days to an including February 11, 1994.

IT IS SO ORDERED.

Dated: October 7, 1993

/s/G.L. Taylor

THE HONORABLE GARY L. TAYLOR
United States District Court Judge

Presented by:

ROSSBACHER & ASSOCIATES
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Los Angeles, CA 90071
(213) 895-6500

/s/Linda L. Griffis

Linda L. Griffis

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Attorneys for Petitioner
KENNETH CLAIR

FILED
JUL 28 1993
ENTERED
JUL 29 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, vs. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133-GLT DEATH PENALTY ORDER CONTINUING FILING FOR SPECIFICATION OF NONFRIVOLOUS ISSUES AND EXTENDING STAY OF EXECUTION

Upon application of Henry H. Rossbacher, appointed counsel for petitioner Kenneth Clair, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The Specification of Nonfrivolous Issues required by the Central District's Local Rule 26.8.7(c) shall be filed in this matter on or before October 11, 1993.

(2) The execution of the sentence of death imposed upon Kenneth Clair is hereby stayed for an additional sixty (60) days to and including October 11, 1993.

IT IS SO ORDERED.

Dated: July 27, 1993

/s/G.L. Taylor

THE HONORABLE GARY L. TAYLOR
United States District Court Judge

Presented by:

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Los Angeles, CA 90071
(213) 895-6500

/s/Linda L. Griffis

Linda L. Griffis

Attorneys for Petitioner
KENNETH CLAIR

Kenneth CLAIR, Petitioner
v.
Daniel VASQUEZ, Respondent

No. CV 93-1133-GLT

July 23, 1993

United States District Court
Central District of California

ORDER DENYING RESPONDENT'S MOTION TO VACATE STAY OF EXECUTION

TAYLOR, District Judge.

Respondent moves the Court in this death penalty case to vacate a 45-day stay of execution. The motion is DENIED.

I. BACKGROUND

Petitioner is a death-sentenced prisoner. In February 1993, petitioner filed a request for appointment of counsel in his federal habeas corpus proceeding, and moved to stay his April 1993 execution. Respondent opposed the stay, arguing that the Court lacked jurisdiction to enter a stay absent the filing of a petition for writ of habeas corpus. In March 1993, this Court granted a 45-day stay of execution and forwarded petitioner's request for appointment of counsel to the Attorney Selection Board for the Central District of California. See Central District of California, Local Rule 26.8.4(a). Respondent appealed the stay order, and the appeal is now pending. *See Vasquez v. Clair*, Ninth Circuit Case No. 93-99004.

In May 1993, Michael Millman, director of California Appellate Project and member of the Attorney Selection Board, requested an additional 45-day stay of execution to allow the Selection Board more time to find counsel for the petitioner. The Court granted an additional 45-day stay. Respondent moved to vacate the May stay of execution. [1/]

Respondent contends Mr. Millman was not retained or appointed on behalf of petitioner, nor did he qualify as a "next friend," so the Court lacked jurisdiction to entertain Millman's request for an extension. Respondent also asserts the Court had no jurisdiction to stay an execution when no petition for writ of habeas corpus had been filed.

II. DISCUSSION

I. *Mr. Millman's Authority to Request a Stay.*

Respondent argues there is no basis for federal jurisdiction to extend the stay since the request came from Mr. Millman, rather than from petitioner. Specifically, respondent contends that, without a showing petitioner lacks mental capacity to litigate his own case, or Mr. Millman represents petitioner, Mr. Millman's request cannot be considered by the Court.

Respondent's challenge to Mr. Millman's authority to request the stay of execution is well-taken. Petitioner has standing to petition for a writ of habeas corpus and

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1 While the Motion has been pending, the May stay expired, the court issued a new temporary stay at Mr. Millman's request, and permanent counsel was thereafter found and appointed. However, because of the importance of this issue, the court will not deem the matter moot and will decide it on its merits.

seek a stay, either by himself or through one representing him. However, Mr. Millman does not represent petitioner, and has no legal authority to act on petitioner's behalf. Local Rule 26.8.7(b).

Mr. Millman was not acting as petitioner's "next friend." A next friend is not a party to a habeas corpus proceeding, but pursues the cause on behalf of the petitioner who remains the real party in interest. *See Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 1727, 109 L.Ed.2d 135 (1990). A necessary prerequisite for the "next friend" status is a showing that the real party cannot present his own case due to mental incapacity, lack of access to Court, or some other disability. *Id.* at 165, 110 S.Ct. at 1728. No such claim is made here.

In seeking a stay of petitioner's execution, Mr. Millman was acting in his capacity as a member of the Attorney Selection Board. Local Rule 26.8.7(b) authorizes an attorney-member of the Attorney Selection Board, such as Mr. Millman, to assist an indigent petitioner in filing *pro se* applications for appointment of counsel and temporary stay of execution. The rule, however, contemplates that the petitioner, not the selection board attorney, will make the actual request for a stay of execution.[2/] However, the circumstances of this case do

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2 This is not the situation where a condemned inmate did not wish to fight his death sentence, but someone else attempted to do so on his behalf. *See e.g., Whitmore*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)(fellow death row inmate); *Lenhard v. Wolff*, 443 U.S. 1306, 100 S.Ct. 3, 61 L.Ed.2d 885 (Rehnquist, Circuit Justice 1979)(inmate's attorney); *Gilmore v. Utah*, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976)(Mem., Burger, J., concurring)(inmate's mother).

not require vacation of the previously granted stay of execution. The Court requested the assistance of the Attorney Selection Board in finding appropriate counsel for petitioner. To accommodate the search, the Court granted petitioner's personal request for the first stay of execution. As the stay expiration drew near, it was the selection board, not petitioner, who was in the best position to provide the Court with a status report on the search for counsel and a time estimate to complete the task. In the absence of a Court ruling on the point, it is understandable that Mr. Millman would make the application for additional time. It would be unfair to petitioner to set aside the stay on that basis. It is within the Court's discretion to disregard this defect. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990.)

II. *The Court's Jurisdiction to Enter a Stay.*

Respondent asserts this Court lacked jurisdiction to enter a stay of execution without petitioner having first filed his petition for writ of habeas corpus. The Ninth Circuit rejected this argument in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). *Brown* holds that a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. Id. at 1165.

This Court exercised the jurisdiction that *Brown* found to be proper. Respondent's attempt to distinguish *Brown* by challenging the validity of the local rules is without merit. *Brown* specifically held that an application

for appointment of counsel under Local Rule 26.8.7(b) constitutes part of a habeas corpus proceeding under 28 U.S.C. § 2254 sufficient to grant the district court jurisdiction to enter a stay of execution. While the local rules also recognize this court's jurisdiction, this Court relied on *Brown*, not just the local rules, in granting the stay. [3]

The Office of the Attorney General of California continues to assert a position that is contrary to established Ninth Circuit case law. The Court takes judicial notice that respondent has raised seven jurisdictional challenges in the Central District to stays of execution pending the filing of a petition. The motion to vacate the stay in Brown was originally denied and the denial was affirmed by the Ninth Circuit. The United States Supreme Court denied certiorari. Respondent filed another motion to vacate a stay in *Thompson, v. Vasquez*, CV 90-6605-JMI. This Court denied the motion and the Ninth Circuit affirmed, citing *Brown*. *Vasquez v. Thompson*, No. 91-55525, 1992 WL 46686. Petition for certiorari was also denied. *See* ___ U.S. ___, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992). Respondent then filed motions to vacate stays of execution in *Fields v. Vasquez*, CV 92-0465-RG; *Anderson v. Vasquez*, CV 92-0488-JGD; *Deere v. Vasquez*, CV 92-1684-GLT; and *Frank v. Vasquez*, CV 91-6287-AHS, as well as filing an earlier motion in this case. In all

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3 The fact that the appellants in *Brown* did not challenge the validity of the local rules does not mean that the local rules are somehow invalid. 952 F.2d at 1168. If anything, *Brown* suggests an implicit validation of the local rules relating to appointment of counsel and stays of execution.

instances, this Court rejected the motions to vacate, citing *Brown*. Despite repeated rejection of the position, respondent is currently appealing the denials in *Deere* (Ninth Circuit No. 92-55648) and in this case (Ninth Circuit No. 93-99004).

Respondent flatly asserts that the district court has no jurisdiction to order a stay of execution, while relegating the controlling contrary Brown to a "but see" citation. Respondent provides only a Daily Appellate Report citation for *Brown*, notwithstanding that *Brown* was decided over a year ago, has an F2d cite, and (not discussed by respondent) the United States has denied certiorari.

Respondent is close to the line between advocacy and frivolousness on this issue. The filing of future such motions that are contrary to established Ninth Circuit law will be carefully scrutinized under Rule 11.

III. DISPOSITION

Respondent's motion to vacate the stay of execution is DENIED.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUL 12 1993
ENTERED
JUL 21 1993

KENNETH CLAIR,	)	Case No. CV-93-1133-GLT
Petitioner,	)	ORDER FOR EXTENSION OF STAY OF EXECUTION
v.	)	
DANIEL VASQUEZ, Warden of California State Prison at San Quentin,	)	DEATH PENALTY CASE
Respondent.	)	

Upon application of MICHAEL G. MILLMAN of the Selection Board for the United States District Court for the Central District of California, and good cause appearing therefore,

Pursuant to Local Rule 26.8.7(b), it is hereby ordered that the execution of the sentence of death imposed

upon KENNETH CLAIR be stayed for an additional thirty (30) days, to and including August 11, 1993.

Dated: July 9, 1993

/s/G.L. Taylor

United States District Judge

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED
MAY 26 1993
FILED
MAY 27 1993

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-93-1133-GLT ORDER FOR EXTENSION OF STAY OF EXECUTION DEATH PENALTY CASE

Upon application of MICHAEL G. MILLMAN of the Selection Board for the United States District Court for the Central District of California, and good cause appearing therefore,

Pursuant to Local Rule 26.8.7(b), it is hereby ordered that the execution of the sentence of death imposed

upon KENNETH CLAIR be stayed for an additional forty-five (45), to and including July 12, 1993.

Dated: May 27, 1993

/s/G.L. Taylor

United States District Judge

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board

MICHAEL G. MILLMAN
Selection Board for the United States District Court,
Central District of California
California Appellate Project
One Ecker Place, 4th Floor
San Francisco, CA 94105
(415) 495-0500

On behalf of KENNETH CLAIR

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV-93-1133-GLT APPLICATION FOR EXTENSION OF STAY OF EXECUTION (LOCAL RULE 26.8.4(a); 26.8.7(b)) DEATH PENALTY CASE

MICHAEL G. MILLMAN, a member of the Selection Board for the United States District Court for the Central District of California, acting on behalf of KENNETH CLAIR, hereby requests, pursuant to Local Rule 26.8.7(b), that the forty-five (45) day stay of execution to May 28, 1993, previously ordered by this

Court be extended for an additional forty-five (45) days, to and including July 12, 1993.

KENNETH CLAIR is presently under judgement of death in Orange County Superior Court, Case No. C-57572. That judgment was affirmed on direct appeal by the California Supreme Court on May 7, 1992. People v. Clair, 2 Cal4th 629 (1992). The United States Supreme Court denied Mr. Clair's petition for writ of certiorari on January 11, 1993. The Orange County Superior Court ordered an execution date set for April 13, 1993. On February 26, 1993, pursuant to Local Rule 26.8.7(b), petitioner submitted a pro se Request for Appointment of Counsel and for Stay of Execution. On March 1, 1993, this Court granted a temporary stay of execution for forty-five (45) days, to and including May 28, 1993.

Pursuant to Local Rule 26.8.4(a)(iv), the Selection Board has been attempting to identify counsel to suggest for appointment to represent petitioner in these federal habeas corpus death penalty proceedings. These efforts have been hampered by recent publicity regarding the anticipated cessation of payments to panel attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A. An additional forty-five (45) days is necessary for the Selection Board to complete the process of recommending the appointment of counsel, and for newly appointed counsel to file a specification of nonfrivoulous issues, pursuant to Local Rule 26.8.7(c), that will entitle counsel to a further stay of 120-days in which to prepare the habeas corpus petition.

Accordingly, I request that the Court extend its present stay of execution for an additional forty-five (45) days, to and including July 12, 1993.

DATED: May 25, 1993 Respectfully submitted,

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board for the
United States District Court,
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED
FEB 26 1993
FILED
MAR 2 1993
ENTERED
MAR 4 1993

KENNETH CLAIR,	)	Case No. 93-1133-GLT
	)	
Petitioner,	)	DEATH PENALTY
	)	CASE
	)	EXECUTION
	)	IMMINENT
v.	)	[Execution
	)	Date:4/13/93]
	)	TEMPORARY STAY
	)	OF EXECUTION
DANIEL VASQUEZ,	)	
Warden of California	)	
California State Prison at	)	(LOCAL
San Quentin	)	RULES 26.8.4(iv)
Respondent.	)	and 26.8.7(b))
	)	

It appearing to the court that petitioner, KENNETH CLAIR, seeks the appointment of counsel pursuant to Local Rule 26.8.4(iv); that the Superior Court of Orange County has set an execution date of April 13, 1993; that petitioner has filed an application for appointment of counsel and for temporary stay of execution to permit the appointment of counsel; and that Local Rule 26.8.7(b) provides for an issuance of a temporary stay of execution to permit selection and appointment of counsel upon application by petitioner,

IT IS HEREBY ORDERED that the execution be STAYED to permit appointment of counsel. The Warden of San Quentin Prison is ordered to stay the execution of Kenneth Clair, scheduled for April 13, 1993, for forty-five (45) days, to and including May 28, 1993, unless extended by the Court.

DATED: March 1, 1993

/s/G.L. Taylor

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
California Appellate Project

Kenneth Clair
P.O. Box D-7300, 1-E-115
Tamal, CA 94974

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,	)	Case No. _____
	)	DEATH PENALTY
Petitioner,	)	CASE
	)	EXECITION
v.	)	IMMINENT
	)	[Execution date:
DANIEL VASQUEZ, as	)	4/13/93]
Warden of California State	)	REQUEST BY
Prison at San Quentin,	)	PRISONER FOR
	)	APPOINTMENT OF
Respondent.	)	COUNSEL IN
	)	CALIFORNIA DEATH
	)	SENTENCE CASE
	)	AND FOR STAY OF
	)	EXECUTION OF
	)	DEATH SENTENCE
_____	)	

I, Kenneth Clair, request that this Court appoint an attorney to represent me in federal habeas corpus proceedings in my death sentence case. (Local Rule 26.8.4(iv).)

On January 11, 1993, the United States Supreme Court denied a timely petition for a writ of certiorari (No. 92-6563), filed by counsel on my behalf, after affirmance of the judgment of death by the California Supreme Court on May 7, 1992.

The Orange County Superior Court has set April 13, 1993 as the date for the execution of the judgment of death.

As set forth in the accompanying declaration, the attorney appointed to represent me in state proceedings is not available to represent me in federal habeas corpus proceedings.

WHEREFORE, under Central District of California Local Rule 26.8.4(iv), I request that competent and qualified counsel be appointed to represent me in federal habeas corpus proceedings. I further request that this Court stay the execution of my sentence, scheduled for April 13, 1993, for forty-five days from that date to permit the appointment of counsel, pursuant to Local Rule 26.8.7(b).

Dated: Feb. 22, 1993

Respectfully submitted,

/s/Kenneth Clair

KENNETH CLAIR

Kenneth Clair
P.O. Box D-7300, 1-E-115
Tamal, CA 94974

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, as Warden of California State Prison at San Quentin, Respondent.	Case No._____ DEATH PENALTY CASE EXECITION IMMINENT [Execution date: 4/13/93] DECLARATION IN SUPPORT OF REQUEST BY PRISONER FOR APPOINTMENT OF COUNSE IN CALIFORNIA DEATH PENALTY CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE

I, Kenneth Clair, request that this Court appoint an attorney to represent me in federal habeas corpus litigation to be initiated in the federal courts on my behalf. In support of this request, I hereby declare:

1. I was sentenced to death in the Orange County Superior Court, State of California, on December 4, 1987. I am incarcerated at San Quentin Prison, located in San Quentin, California.

2. My death sentence was affirmed by the California Supreme Court on May 7, 1992. On January 11, 1993, the United States Supreme Court denied my timely petition for a writ of certiorari (No. 92-6563).

3. I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition.

4. The attorney who represented me in the most recent state court proceedings was John N. Hauser of San Francisco, California, and he is unable to represent me in these federal habeas corpus proceedings.

5. I cannot afford to retain an attorney to represent me in these proceedings. I am indigent and consequently have no assets.

I declare under penalty of perjury that the above statements are true and correct.

Dated: Feb. 22, 1993

/s/Kenneth Clair

KENNETH CLAIR

APPENDIX B

John G. BROWN, Petitioner-Appellee
v.
Daniel VASQUEZ, Warden, Daniel E. Lungren,
Attorney General of the State of California

No. 90-56127

Decided December 31, 1991
As Amended February 19, 1992

Appeal from the United States District Court
for the Central District of California.

Before FLETCHER, THOMPSON and Leavy, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

John G. Brown is a California state prisoner who has been sentenced to death. His conviction and sentence were affirmed by the California Supreme Court. *People v. Brown*, 46 Cal.3d 432, 250 Cal.Rptr. 604, 782 P.2d 1135 (1988). His petition for a writ of certiorari was denied by the United States Supreme Court. *Brown v. California*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989). His petition for a writ of habeas corpus filed with the California Supreme Court was denied. His execution was scheduled for June 8, 1990.

On June 1, 1990, Brown, proceeding pro se, filed in the United States District Court for the Central District of California a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." In an accompanying declaration he stated that he was under imminent sentence of death, that the attorney who represented him in state court was unavailable to

represent him in his federal habeas proceeding, and that he could not afford to retain an attorney. He further stated: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitled me to relief from the judgment of death. I need the assistance of counsel in preparing the petition."

Pursuant to its Local Rule 26.8.7(b),[4] the district court ordered Brown's execution stayed for forty-five days. The district court subsequently extended the stay of an additional thirty days, citing as a primary reason difficulty in finding appointed counsel to represent Brown. On July 30, 1990, counsel was appointed to represent Brown. On August 10, 1990, at appointed counsel's request and pursuant to the Central District's Local Rule 26.8.7(c),[5]

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4 Local Rule 26.8.7(b) provides in relevant part:

> "Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing *pro se* applications for appointment of counsel and for temporary stay of execution. Upon filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court."

5 Local Rule 26.8.7(c) states that:

> "Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivoulous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivoulous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition."
>
> Following his appointment, Brown's attorney satisfied the requirements of this section by

the district court granted an additional stay of 120 days to afford appointed counsel time to prepare and file Brown's habeas petition.

The state respondents moved to vacate the stay of execution. They contended the district court lacked jurisdiction because Brown had not filed a petition for habeas corpus relief, and thus, they argued, there was no proceeding pending before the district court on which to predicate a stay order under 28 U.S.C. § 2251. [6]

The district court denied the motion. It held that it had jurisdiction under the All Writs Act [7] to issue any

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identifying six nonfrivolous and independent constitutional issues which he intended to raise in the habeas corpus petition. *Brown v. Vasquez*, 743 F.Supp. 729, 732, n. 10 (C.D. Cal. 1990).

6 This section provides:

> "A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any state for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any state court or by or under the authority of any state shall be void. If no stay is granted, any such proceeding shall be valid as if no habeas corpus proceeding or appeal were pending."

7 The All Writs Act appears at 28 U.S.C. § 1651(a). It provides that, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Appellant's argue that the All Writs Act is superseded for purposes of this case by 28 U.S.C. § 2283 (the Anti-Injunction Act), and therefore cannot serve as the jurisdictional basis for the district court's action. We do not address the merits of this claim because we concluded that 28 U.S.C. § 2251 provides an adequate independent basis for the district court's exercise of jurisdiction.

orders necessary to preserve its potential jurisdiction, including a stay of execution in anticipation of the filing of a petition for a writ of habeas corpus. *Brown v. Vasquez*, 743 F.Supp. 729, 732 (C.D. Cal. 1990). The state respondents appeal. We affirm, although for reasons different from those stated by the district court.

DISCUSSION

The issue presented by this appeal is whether a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. We conclude a district court has such jurisdiction. We have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) [1].

When a death penalty prisoner has a habeas corpus proceeding pending before a federal district court, that court has jurisdiction to stay the prisoner's execution. 28 U.S.C. § 2251. Appellant's contend that a "habeas corpus proceeding" cannot be considered "pending" before a district court under section 2251 until something has been filed with the court that can be interpreted as a petition for a writ of habeas corpus. [2] Appellants point out that what

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8 This section provides, in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from . . . interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ."

9 The procedural and substantive requirements for a petition for writ of habeas corpus are found at 28 U.S.C. § 2242. This section is augmented by Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts.

Brown filed was not a habeas petition, but simply a request and declaration seeking appointment of counsel to help him prepare a habeas petition. We agree that what Brown filed should not be interpreted as a petition for writ of habeas corpus.[10/] But this does not end the inquiry.

The Supreme Court has recognized that "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969). It is, in essence, "the first line of defense against constitutional violations." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977).

Given the fundamental importance of the writ, it is essential that it be "administered with the initiate and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291, 89 S.Ct. at 1086. The Court has "consistently rejected interpretations of the habeas corpus state [11/] that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court*, 411

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10 While recognizing that the federal courts have a responsibility to construe liberally *pro se* prisoners' vaguely-framed pleadings as habeas petitions where the interests of justice demand, *see, e.g., Taylor v. United States*, 929 F.2d 451 (9th Cir. 1991) (construing "Motion under 28 U.S.C. § 2255" as a petition for habeas under 28 U.S.C. § 2241); *Tucker v. Carlson*, 925 F.2d 330 (9th Cir. 1990) (section 1983 and *Bivens* action construed as habeas), what Brown filed here was a request for counsel to help him prepare and file a petition, not, in itself, a petition for writ of habeas corpus.

11 The federal habeas corpus statue is set forth at 28 U.S.C. §§ 2241 to 2255.

U.S. 345, 350, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

In *Hensley*, the Court was called upon to determine whether a state prisoner who had been released on his own recognizance was "in custody" for purposes of the federal habeas statute. [12] In holding that habeas relief is not restricted to situations where the petitioner is subject to present physical confinement, the Court emphasized that "habeas corpus is not 'a static, narrow, formalistic remedy,' but one which must retain the 'ability to cut through barriers of form and procedural mazes.'" *Id.* 411 U.S. at 349-50, 93 S.Ct. at 1573-74 (quoting *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963), and *Harris*, 394 U.S. at 291, 89 S.Ct. at 1086).

The *Harris* admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially relevant in the present case in light of the court's recent decision in *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In *McCleskey*, the Court held that the doctrine of abuse of the writ [13] barred a prisoner from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had

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12 In *Hensley*, the Court was interpreting section 2243(c)(3) which limits the availability of habeas corpus relief to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States."

13 The doctrine of abuse of the writ "refers to a complex and evolving body of equitable principles" which determine whether a habeas corpus petitioner can bring a federal constitutional claim in a habeas action when he failed to assert the claim in a prior habeas proceeding. *McCleskey*, 111 S.Ct. at 1467.

not raised the claim in his initial federal application and could not show either good cause for failing initially to raise the claim and prejudice resulting from such failure, or that a fundamental miscarriage of justice would result if the claim were not entertained. *McCleskey*, 11 S.Ct. at 1470. The Court also restated its position taken in *Antone v. Dugger*, 465 U.S. 200, 205-06 & n. 4, 104 S.Ct. 962, 964-65 & n. 4, 79 L.Ed.2d 147 (1984) (per curiam), that a habeas petitioner will not be excused from failing to raise a claim in his first federal petition on the ground that his counsel had to prepare the first petition in haste and did not have time to become familiar with the case. *McCleskey*, 111 S.Ct. at 1467.

Given the teaching of McCleskey, a prisoner applying for habeas relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandably, is often beyond the abilities of most prisoners. Murray v. Giarratano, 492 U.S. 1, 28, 109 S.Ct. 2765, 2780, 106 L.Ed.2d 1 (1989). (Stevens, J., dissenting). It is thus not surprising that when a prisoner attempts to prepare his own habeas petition without the assistance of counsel, the product of his efforts is often a confusing and incomprehensible amalgam of claims which not only fails to protect the prisoner, but which ties up valuable court

time in the inevitable struggle to comprehend what it is that is being alleged. [14]

The Supreme Court has recognized the inherent problems faced by prisoners, and by the courts, when prisoners are forced to file habeas petitions pro se. In *Johnson v. Avery*, the Court held that a state could not bar prisoners from furnishing assistance to other prisoners in filing habeas corpus petitions. It recognized, however, that even with the help of experienced prison "writ-writers," petitions filed without the assistance of an attorney are "often so unskillful as to be a burden on the courts, which receive them." 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969). In his concurrence, Justice Douglas argued that the pre-petition assistance of an attorney would greatly benefit both the prisoner and the court system:

> "A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could

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14 In a report of the Committee on Habeas Corpus, a group of circuit judges addressed the problems faced by the judiciary in dealing with pro se petitions for habeas relief:

> "Much of the judges' time is spent trying to decipher and interpret the chaotic papers that come to him from prison inmates. Many of the petitioners are illiterates, or persons of limited education who depend upon "jailhouse lawyers" for assistance in preparing these documents. Not only are such practitioners notoriously unreliable, but their work product is often a mass of confused and incomprehensible mumbo-jumbo."

Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts, 33 F.R.D. 364, 384 (1983). *See also*, Marshall W. Krause, *A Lawyer Looks at Writ-Writing*, 56 Calif.L.Rev. 371, 376 (1968) ("the number of frivolous petitions filed would be greatly reduced if prisoners could have an objective evaluation of their chance before filing their petitions").

> immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks -- that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs."

Id. at 494, n. 10, 89 S.Ct. at 753, n. 10 (Douglas J., concurring)(quoting Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 Calif.L.Rev. 343, 345-546 (1968).

Notwithstanding the foregoing, as the Court in *McCleskey* reasserted, there is no constitutional right to counsel in federal habeas corpus proceedings. *McCleskey*, 111 S.Ct. at 1471, citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987), even if the habeas petitioner may be facing a sentence of death. *Murray*, 492 U.S. at 10, 109 S.Ct. at 2770-71. In his concurrence in *Murray*, however, Justice Kennedy recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief

without the assistance of persons learned in the law." *Id.* at 14, 109 S.Ct. at 2772-73 (Kennedy, J., concurring).

Justice Stevens dissented in Murray. In arguing that a constitutional right to counsel should exist in the initial stages of a habeas corpus proceeding, he emphasized the many obstacles faced by an incarcerated habeas prisoner, as well as the tremendous drain that pro se habeas petitions place upon the judicial system:

> "The State already appoints counsel to death row inmates who succeed in filing postconviction petitions asserting at least one nonfrivoulous claim; therefore, the additional cost of providing . . . death row inmates competent counsel to prepare such petitions should be minimal. [citation omitted]. Furthermore, multiple filings delay the conclusion of capable litigation and exacerbate the already serious burdens these cases impose on the State's judicial system and the legal department. It seems obvious that professional preparation of the first postconviction petition, by reducing successive petitions would result in a net benefit [to the court system]."

Murray, 492 U.S. at 29-30, 109 S.Ct. at 2781 (Stevens, J. dissenting). [15]

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15 Justices Brennan, Marshall and Blackmun joined the dissent. When combined with Justice Kennedy and O'Conner, who joined in the concurrence, a total of six members of the Court took express notice of the plight confronting inmates attempting to challenge their conviction by habeas corpus without the assistance of counsel.

The Central District of California's Local Rules 26.8.7(b) and (c) address the foregoing concerns. These rules authorize the appointment of counsel to assist a death penalty prisoner in preparing and filing a habeas petition, and provide for issuance of a stay of execution pending this process.

The appellants do not challenge the validity of these rules. Rather, they argue that a prisoner who seeks the appointment of counsel and a stay of execution under the rule must allege some federal constitutional violation to provide the district court with a necessary habeas "proceeding" to give it a jurisdictional base to support a stay of execution. The appellants assert it is a minor burden at most to require a prisoner to allege some constitutional violation. They argue all the prisoner need do is file something that can be interpreted as a habeas corpus petition, no matter how inartfully it may be drawn. Thereupon, according to the thrust of the appellants' argument, a long-suffering district court through the process of reviewing the petition and allowing amendments will assist the prisoner in eventually coming up with a reasonably adequate habeas petition.

We reject this argument. The Central District rules do not require the filing of a habeas petition as a prerequisite to the issuance of a stay order. Neither does the federal habeas corpus statute. See 28 U.S.C. § 2251. Although there is no constitutional right to the appointment of counsel in a death penalty habeas proceeding, this does not preclude a district court from appointing counsel in such a case. *See* 18 U.S.C. § 3006A(a)(2)(B) (United States district court may provide counsel to persons seeking

habeas relief where "the interests of justice so require"); *cf. Murray*, 492 U.S. at 10, n. 5, 109 S.Ct. at 2770-71, n. 5 (State of Virginia not constitutionally required to appoint counsel for a death penalty habeas petitioner, but its courts have statutory authority to do so). If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity.

We conclude that the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under section 2251. Viewed in this manner, a habeas corpus proceeding is pending before a federal district court when such an application is filed.

The appellants cite to Rule 3 of the Federal Rules of Civil Procedure which provides that "[a] civil action is commenced by filing a complaint in the court." They argue by analogy that a habeas corpus proceeding under section 2251 cannot "commence" until something which can be interpreted as a petition for habeas corpus relief is filed. We disagree.

While it is true that a habeas corpus proceeding is civil in nature, *see, e.g., Kurtz v. Moffitt*, 115 U.S. 487, 494, 6 S.Ct. 148, 149, 29 L.Ed. 458 (1885), it is equally

true that such a proceeding is dramatically different from any other type of civil action. As the Supreme Court has stated, habeas corpus proceedings are of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827, 97 S.Ct. 1497 (quoting *Johnson*, 393 U.S. at 485, 89 S.Ct. at 749). As a result, courts are not bound to systematically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purpose of the federal habeas corpus statute. [16]

Appellants' assertion that the Anti-Injunction Act prevents the district court from ordering a stay of Brown's execution is also without merit. The Anti-Injunction Act provides that, "[a] court of the United States may not grant an injunction to stay any proceeding in a State court except as expressly authorized Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The federal habeas corpus statute, however, clearly constitutes an "expressly authorized" exception to the Act. *Mitchum v. Foster*, 407 U.S. 225, 234-35, 92 S.Ct. 2151, 2157-58, 32 L.Ed.2d 705 (1972). As a result, the Anti-Injunction Act does not

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16 Rule 11 of the Rules Governing Section 2254 Cases in United States District Courts, enacted by Congress in 1977, recognizes that the Civil Rules do not necessarily control habeas corpus proceedings. Rather, the Civil Rules, "to the extent that they are not inconsistent with [the Habeas Corpus Rules], may be applied, when appropriate, to [habeas corpus] proceedings . . . ."

The Advisory Committee Notes following Rule 11 further clarify that, "The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." *See also Harris*, 394 U.S. at 299, 89 S.Ct. at 1090.

prevent a district court from staying a state court proceeding pursuant to 28 U.S.C. § 2251.

CONCLUSION

We hold that application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for a stay of execution, filed pursuant to Central District of California Local Rules 26.8.7(b) and (c), constitutes part of a "habeas corpus proceeding" as set forth in 28 U.S.C. § 2251. As such, the district court had jurisdiction to stay Brown's execution pending the appointment of counsel and the filing of a habeas petition.

AFFIRMED.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. 70

Court convened at 1:30 p.m., February 19, 1993, present Hon. Mason L. Fenton, Assigned Judge; Janet May, Deputy Clerk; Richard Shunkey, Bailiff; Heidi Stewart, Reporter; and the following proceedings were had:
C-57572 PEOPLE OF THE STATE OF CALIFORNIA vs. CLAIR, KENNETH
PUBLIC HEARING re Setting Date of Execution
In open court at 1:30 pm. Defendant, not present, represented by counsel, Doug Painter. People represented by counsel, Ronald Cafferty, Deputy District Attorney. Court has read the Commitment (Murder) Judgment of Death, Death Warrant. Whereas, on an automatic appeal to the Supreme Court of the State of California was decided on June 24, 1992, the judgment of the Superior Court imposing the death penalty for the crime of murder in the first degree as alleged in the Information and with the alleged special circumstances was affirmed: Whereas, the judgment and sentence herein has now become final and the Certificate (remittitur) from the Supreme Court of the State of California affirming said judgment has been returned to this court: Whereas, on January 11, 1993, defendant Kenneth Clair's petition for writ of certiorari was denied by the United States Supreme Court: Whereas, there is at this time no stay of execution pending in any court of the State of California, Supreme

Court of the United States or Circuit Court of the United States, it is hereby ordered and adjudged Clair shall suffer the death penalty, and that said penalty shall be inflicted within the walls of the State Prison of San Quentin, California, in the manner and means prescribed by law on the 13th day of April, 1993. The District Attorney is ordered to prepare the Death Warrant. With no further stay of execution pending in any court, Court signs the Death Warrant. ENTERED February 19, 1993.

/s/Mason L. Fenton

MASON L. FENTON, Judge
of the Superior Court
Assigned

ATTEST:
Gary L. Granville, County Clerk
and Clerk of the Superior Court of
the State of California, in and for
the County of Orange.

[SEAL]

BY:
/s/Janet Mary

Deputy County Clerk

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. C-57572
Plaintiff,	)	COMMITTMENT (MURDER);
vs.	)	JUDGMENT OF DEATH; DEATH
KENNETH CLAIR,	)	WARRANT (Penal Code Section 1227)
Defendant.	)	

TO: THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN:

BE IT REMEMBERED that on the 22nd day of June, 1987, a First Amended Information numbered C-57572 was duly filed against the defendant, KENNETH CLAIR, by the District Attorney of Orange County, charging said defendant in Count I with the murder of LINDA FAYE RODGERS, on November 15, 1984, in violation of Penal Code section 187; Count II with the burglary of an inhabited residence located at 1721 West Wilshire, Santa Ana, on November 15, 1984, in violation of Penal Code section 459; Count III with the burglary of an inhabited residence located at 1721 West Wilshire, Santa Ana, on November 7, 1984, in violation of Penal Code section 459.

And it was further alleged that before the commission of the serious felonies here and above set forth, said KENNETH CLAIR was on or about the 9th day of September, 1976, in the Criminal District Court of

the Parish of Orleans, State of Louisiana, convicted of a serious felony, to wit: armed robbery, in violation of the law and statutes of said state, said offense being a serious felony within the meaning of Penal Code sections 667 and 1192.7(c).

And it was further charged and alleged that the murder was committed under the following special circumstances, to wit:

Number One: That the murder of LINDA FAYE RODGERS was committed by defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the commission of the crime of burglary in the first degree in violation of Penal Code section 460, within the meaning of Penal Code section 190.2(a)(17)(vii).

Number Two: That the murder of LINDA FAYE RODGERS was committed by the defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the attempted commission of the crime of rape in violation of Penal Code section 261, within the meaning of Penal Code section 190.2(a)(17)(iii).

Thereafter, defendant was duly arraigned, entered a plea of not guilty to the charges of murder, burglary (both counts), denied the special allegation of conviction of a serious felony, and denied the special circumstances allegations as set forth in the First Amended Information.

Thereafter, on June 23, 1987, the defendant and his attorney being present, the case came on for trial and the selection of the jury was commenced. On July 14, 1987, the trial jury and four alternates were duly and regularly impaneled and sworn to try the above entitled case.

Thereafter, evidence was duly presented to the trial jury as to the issues raised by the defendant's plea of not guilty and his denial of the special circumstances charged in the First Amended Information. Argument was made to the trial jury by the prosecution and defense, and the court instructed the trial jury as to the law applicable to the case.

Thereafter, on July 28, 1987, the trial jury rendered a verdict of guilty as to Count I, murder, and fixed the degree of murder in the first degree.

The jury also found one of the special circumstances allegations to be true; that the murder of LINDA FAYE RODGERS was committed by the defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the commission of the crime of burglary in the first degree. The jury found the other special circumstances allegation to be not true.

The trial jury also rendered additional verdicts of guilty as to the burglaries charged in counts II and III, and fixed the degree of burglary for both counts in the first degree.

Thereafter, on August 3, 1987, pursuant to Penal Code section 190.3, evidence was presented on behalf of the People and the defendant as to whether the penalty shall be death or life imprisonment without possibility of parole. Thereafter, following arguments of both counsel and instructions of law by the court on this issue, the said trial jury, on August 6, 1987, did return a finding that the penalty shall be death for the murder committed in Count I.

Thereafter, on December 4, 1987, the defendant's motions for new trial and for modification of the verdict

and finding imposing the death penalty were heard by the court and said motions we denied, whereupon on December 4, 1987, the defendant's counsel stated there was no legal cause why sentence should not be pronounced, the court pronounced judgment as follows:

KENNETH CLAIR, it is the judgment and sentence of this Court that for the offense of murder as charged in Count I of the First Amended Information of which you previously, on July 28, 1987, were found guilty, the jury having found the offense of murder to be first degree, and the jury having returned a finding that the special circumstances alleged in the Information under California Penal Code section 190.2(a)(17)(vii), were true; and the jury having previously, to wit, on August 6, 1987, found that the penalty shall be death; and this Court having, on December 4, 1987, denied your motion for new trial and application for modification of verdict and finding imposing the death penalty; it is the order of this Court that you shall suffer the death penalty, said penalty to be inflicted within the walls of the State Prison at San Quentin, California, in the manner prescribed by law and at a time to be fixed by this court in the warrant of execution.

It is further the judgment and sentence of this court that you are sentenced to the midterm of (4) four years for the burglary of November 7, 1984, set forth in Count III of the First Amended information, the court finding no facts in aggravation or mitigation:

It is further the judgment and sentence of this court that you are sentenced to five (5) years for having been previously convicted of a serious felony, to wit: armed

robbery, in violation of the law and statutes of the State of Louisiana, within the meaning of Penal Code section 667 and section 1192.7(c).

Pursuant to Penal Code section 654 the sentence for the burglary of November 15, 1984, as set forth in Count II of the First Amended Information, is hereby stayed during the pendency of any appeal on Count I of the First Amended Information and shall be permanently stayed when the execution of the death sentence on Count I is carried out.

You are remanded to the care, custody and control of the Sheriff of Orange County to be delivered by him to the Warden of the State Penitentiary at San Quentin, California, within ten days from the date hereof, in the usual course of his duties, for the execution of the sentence on the offense of murder in the first degree contained in Count I of the First Amended Information of which you have been found guilty and one of the special circumstances having been found true, to be held by him pending the final determination of your appeal in this matter, which is automatic, and said sentence to be executed upon final determination of said appeal, and you are to be held by him during said period of time, until further order of this Court. It is so ordered.

On May 7, 1992, in the case of the People v. Kenneth Clair, case number S004789, Crim. No. 26423, the Supreme Court of California issued its opinion affirming the judgment of the Superior Court in its entirety, including that portion of the judgment imposing the death penalty for the crime of murder in the first

degree with the special circumstances allegation found to be true by the trial jury.

On June 24, 1992, the Supreme Court of California denied defendant KENNETH CLAIR'S petition for re-hearing and issued its remittitur.

The judgment and sentence have now become final and the remittitur of the Supreme Court of California has been returned to and filed in this court.

On January 11, 1993, defendant Kenneth Clair's petition for writ of certiorari was denied by the United States Supreme Court.

There is at this time no stay of execution pending in any court of the State of California, Supreme Court of the United States, Circuit Court of the United States or District Court of the United States.

IT IS HEREBY ORDERED AND ADJUDGED that for the crime of murder in the first degree with special circumstances, the defendant KENNETH CLAIR, shall suffer the death penalty and that said penalty be inflicted within the walls of the State Prison at San Quentin, California, in the manner and means prescribed by law on the 13th day of April, 1993.

FURTHER, this is to command you, the Warden of the State Prison of the State of California, at San Quentin, California, to hold in your custody the said KENNETH CLAIR, and to carry into effect the judgment of this court by putting to death the said KENNETH CLAIR in the manner and means prescribed by law on the 13th day of April, 1993.

IN WITNESS WHEREOF, I have set my hand as Judge Assigned of the Superior Court, and have caused the

seal of said court to be affixed hereto this 19th day of February, 1993.

/s/Mason L. Fenton

JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE, ON ASSIGNMENT FROM THE JUDICIAL COUNCIL, SAID ASSIGNMENT BEING SIGNED BY THE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

ATTEST:

Gary L. Granville, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange [SEAL]

BY: /s/Janet Mary

Deputy County Clerk

CALIFORNIA DEATH PENALTY CASES INVOLVING PRE-PETITION STAYS OF EXECUTION

Petitioner's Last Name	*U.S.D.C. Case No.*	*Jud. Dist.*	*Date of First Stay*	*Date HC Petition filed*
Odle	CV88-4280-CAL	ND	10-26-88	05-31-89
Howard, G.L.	CV88-7240-WJR	CD	12-02-88	09-25-89
Caro	CV89-1400-GPV	ND	04-25-89	04-27-90
McLain	CV89-3061-JGD	CD	05-18-89	12-28-90
Coleman, R.	CV89-1906-RFP	ND	06-02-89	01-19-90
Karis	CV89-527-LKK	ED	06-02-89	03-26-90
Rich	CV89-0823-EJG	ND	06-08-89	09-18-90

Thompson, T.	CV89-3630-RAG	CD	06-20-89	01-16-90
Jennings, M.	CV89-1360-WAI	ND	11-07-89	04-17-91
Siripongs	CV89-6530-WDK	CD	11-09-89	07-06-90
Miranda	CV89-7130-RJK	CD	12-15-89	06-15-90
Brown, J.G.	CV90-2815-AWT	CD	06-01-90	11-06-91
Coleman, C.	CV90-1588-VRW	ND	06-04-90	07-15-91
Bean	CV90-0648-EJG	ED	06-08-90	07-18-91
Hamilton, M.A.	CV90-363-OWW	ED	06-18-90	12-03-91
Carrera	CV90-478-EDP	ED	08-06-90	08-26-91

Kimble	CV90-4826-SVW	CD	09-12-90	09-17-91
Ghent	CV90-3275-JW	ND	10-01-90	06-18-92
Johnson, J.W.	CV90-3219-DLJ	ND	01-07-91	NYF
Hunter	CV90-6983-JG	ND	11-27-90	NYF
Thompson, R.J.	CV90-6605-JMI	CD	12-05-90	03-01-93
Fields	CV92-0465-RG	CD	01-23-91	05-25-93
Morales	CV91-0682-DT	CD	02-08-91	07-28-92
Burton	CV91-1652-AWT	CD	03-27-91	05-29-92
Turner	CV91-153-REC	ED	04-02-91	03-08-93

Bell	CV91-1115-FMS	ND	04-12-91	06-12-92
Boyde	CV91-2522-WDK	CD	05-13-91	01-18-94
Miller, D.	CV91-2652-KN	CD	05-16-91	NYF
Gordon	CV91-882-LKK	ED	07-08-91	10-23-91
Ramirez	CV91-3802-CBM	CD	07-18-91	04-29-93
Lang	CV91-4061-JMI	CD	07-30-91	04-27-93
Jackson, M.A.	CV91-6983-JG	CD	08-08-91	03-15-93
Douglas	CV91-3055-RSLW	CD	06-13-91	11-18-92
Robbins	CV91-4768-TJH	CD	09-09-91	NYF

Mattson	CV91-5453-WJR	CD	10-09-91	NYF
Stankewitz	CV91-616-OWW	ED	11-15-91	NYF
Frank	CV91-6287-AHS	CD	11-22-91	12-10-93
Jennings, W.	CV91-684-OWW	ED	12-24-91	NYF
Anderson	CV92-0488-JGD	CD	01-24-92	NYF
Gallego	CV92-0653-SBA	ND	02-04-92	NYF
Pensinger	CV92-1928-RMT	CD	03-30-92	NYF
Cooper	CV92-0427-G	SD	03-26-92	NYF
Morris	CV92-0483-EJG	ED	03-30-92	06-15-93

Deere	CV92-1684-GLT	CD	04-01-92	05-17-93
Hayes	CV92-0603-DFL	ED	04-21-92	04-14-93
Taylor	CV92-1627-MHP	ND	05-04-92	NYF
Cox	CV92-3370-CBM	CD	06-04-92	12-10-93
Sanders	CV92-5471-REC	ED	07-14-92	12-17-93
Mickle	CV92-2951-TEH	ND	07-30-92	NYF
Kelly	CV92-5420-TJH	CD	09-08-92	NYF
Nicolaus	CV92-3796-BAC	ND	09-17-92	NYF
Beardslee	CV92-2399-SBA	ND	10-01-92	NYF

Sully	CV92-0829-BAC	ND	10-09-92	NYF
Haskett	CV92-6192-HLH	CD	10-16-92	NYF
Frierson	CV92-6251-RG	CD	10-20-92	NYF
Wharton	CV92-3419-KN	CD	10-21-92	NYF
Allison	CV92-6404-JGD	CD	10-27-92	NYF
Wright	CV92-6918-JMI	CD	11-24-92	NYF
Adcox	CV92-5830-OWW	ED	12-02-92	NYF
Price	CV93-2071-JW	ND	01-25-93	NYF
Mickey	CV93-0243-RMW	ND	01-27-93	NYF

Roberts	CV93-0254-EJG	ED	02-05-93	NYF
Ashmus	CV93-0594-TEH	ND	02-17-93	NYF
Thomas	CV93-0616-MHT	ND	02-19-93	NYF
Clair	CV93-1133-GLT	CD	03-02-93	NYF
Webster	CV93-0306-LKK	ED	03-02-93	NYF
Mincey	CV93-2554-MRP	CD	05-03-93	NYF
Riley	CV93-2071-JW	ND	06-01-93	NYF
Kelly	CV93-2951-TJH	CD	06-04-93	NYF
Pride	CV93-506-GEB	ED	06-10-93	NYF